(2)

NO. 84-134

Office-Supreme Court, U.S.
FILED
AUG 25 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN THE MATTER OF

PETER J. CORUZZI, JUDGE OF THE SUPERIOR COURT OF NEW JERSEY

On Appeal From the Supreme Court of New Jersey

MOTION OF APPELLEE TO DISMISS OF AFFIRM

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Counsel for Appellee
Richard J. Hughes Justice Complex,
CN 112,
Trenton, New Jersey 08625.
(609) 292-1956

MICHAEL R. COLE,
First Assistant Attorney General

EUGENE J. SULLIVAN
Assistant Attorney General,
Of Counsel.

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

BEST AVAILABLE COPY

31pp

Questions Presented

1. Where a state statute is amended to lengthen the period of permissible suspension without pay for judges accused of and subject to removal for misconduct or unfitness, does a claim that the amendment violates the *Ex Post Facto* and Bill of Attainder provisions of the U.S. Constitution as applied to a judge under suspension and facing criminal charges at the time of the amendment constitute a challenge to the validity of the statutory amendment which comes within the appeal jurisdiction of this Court under 28 U.S.C. §1257(2).

2. Does an amendment to a state statute providing for the suspension and removal of judges for misconduct and unfitness which removes a limitation on the permissible period of suspension without pay give rise to a claim under the *Ex Post Facto* and Bill of Attainder clauses of the U.S. Constitution as applied to a judge under suspension at the time of the amendment where the removal statute and amendment are regulatory rather than punitive in purpose.

3. Can the amendment in issue give rise to a claim under the Impairment of Contract clause of the U.S. Constitution where the provisions concerning the removal and suspension of judges are provided for by State law, and no contract can be cited in support of the claim.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
MOTION OF APPELLEE TO DISMISS OR AFFIRM	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT:	
Point I—This appeal should be dismissed because it does not challenge the validity of a state statute under the U.S. Constitution within the meaning of 28 U.S.C. §1257(2), but rather only challenges the statute as applied in this case	7
Point II—This appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed because the federal questions raised are not substantial, in that New Jersey's Judicial Removal Statute is not punitive in intent or design so that the *ex post facto* and Bill of Attainder clauses of the U.S. Constitution do not apply, and in that a judge as a public official holds office under law, not contract, so the Impairment of Contract clause in the U.S. Constitution does not apply	8
CONCLUSION	22

PAGE

Table of Authorities

Cases Cited

Arthurs v. Board of Registration, 418 N.E.2d 1236 (Mass. 1981) 12

Beazell v. Ohio, 269 U.S. 167 (1925) 9

Brown, In re, 157 W.Va. 1, 197 S.E.2d 814 (1973) 12

Butler v. Pennsylvania, 51 U.S. 402 (1850) 19, 21

Calder v. Bull, 3 U.S. 386 (1798) 9

City of Hoboken v. Gear, 27 N.J.L. 265 (Sup. Ct. 1959) 20

Corn v. City of Oakland City, 415 N.E.2d 129 (Ind. Ct. App. 1981) 21

Coruzzi v. State of New Jersey, 705 F.2d 688 (3rd Cir. 1983) 6

Cummings v. Missouri, 71 U.S. 277 (1867) 10, 18

Dierner, In re, 268 Md. 659, 304 A.2d 587 (1973) 13

DeVeau v. Braisted, 363 U.S. 144 (1960) 10, 11

Flemming v. Nestor, 363 U.S. 603 (1960) 10, 17

Furnish v. Board of Medical Examiners, 149 Cal. App. 2d 326, 308 P.2d 924 (Ct. App. 1957), *cert. denied,* 355 U.S. 827 (1957) 12

Galloway v. Council of Clark Tp., 92 N.J. Super. 409, 223 A.2d 644 (Law Div. 1966), *aff'd* 94 N.J. Super. 527, 229 A.2d 279 (App. Div. 1967) 17

Garland, Ex parte, 71 U.S. 333 (1867) 10

Guarantee Trust Co. v. Blodgett, 287 U.S. 509 (1933) 13, 20

Hawker v. New York, 170 U.S. 189 (1898) 10, 11

PAGE

Hiss v. Hampton, 338 F. Supp. 1141 (D.D.C. 1972) 17

Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938) 21

Judge, In re Inquiry Concerning, 357 So.2d 172 (Fla. 1978) 13

Kelly, In re, 238 So.2d 565 (Fla. 1970), *cert. denied,* 401 U.S. 962 (1971) 13

Kingsley International Picture Corp. v. Regents, 360 U.S. 684 (1959) 13, 20

Kingston v. McLaughlin, 359 F. Supp. 25 (D. Mass. 1972), *affirmed,* 411 U.S. 923 (1973) 21

Live Oak Ass'n v. Railroad Commission, 269 U.S. 354 (1926) 7

Needleman, Matter of, 63 A.D.2d 216, 407 N.Y.S. 2d 3 (App. Div. 1978) 12

Nicholson v. Jud. Ret. and Removal Com'n, 562 S.W. 2d 306 (Ky. 1978) 13

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 18

North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (Ct. App. 1981), *mod. and aff'd,* 304 N.C. 627, 286 S.E.2d 89 (1982) 12

Probert, Matter of, 411 Mich. 210, 308 N.W.2d 773 (1981) 13

Randall, Matter of, 640 F.2d 898 (8th Cir. 1981), *cert. denied,* 454 U.S. 880 (1981) 12

Rome, In re, 218 Kan. 198, 542 P.2d 676 (1975) 13

Seraphim, Matter of, 97 Wis.2d 485, 294 N.W.2d 485 (1980), *cert. denied,* 449 U.S. 994 (1980) 13

PAGE

Sharpe v. State ex rel. Oklahoma Bar Ass'n, 448 P. 2d 301 (Okla. Jud. 1968), *cert. denied,* 394 U.S. 904 (1969) 13

State v. Coruzzi, 189 N.J. Super. 273, 460 A.2d 120 (App. Div. 1983), *certif. denied,* 94 N.J. 531, 468 A.2d 184 (1983) 5, 6

Trop v. Dulles, 356 U.S. 86 (1958) 9

Turner v. Passaic Pension Comm., 10 N.J. Misc. 1270, 163 A.2d 282 (Sup. Ct. 1932) 20

United States v. Lovett, 328 U.S. 303 (1946) 18

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 9

Virginia v. Imperial Coal Sales Co., 293 U.S. 15 (1934) 7

Wright v. Vogt, 7 N.J. 1, 80 A.2d 108 (1951) 17

Younger v. Harris, 401 U.S. 37 (1971) 6

United States Constitution Cited

Article I, Section 10, cl. 1 ..... 1, 6, 9, 18, 19, 21

United States Statutes Cited

28 U.S.C.:

Sec. 1257 7

Sec. 1257(2) 7, 8

42 U.S.C.:

Sec. 1983 6

PAGE

New Jersey Constitution Cited

Article VI, Section VI, Para. 4 ..... 2, 15

New Jersey Statutes Cited

N.J.S.A. 2A:1B-1 3
N.J.S.A. 2A:1B-2 3
N.J.S.A. 2A:1B-3 3
N.J.S.A. 2A:1B-5 ..... 3, 5, 8, 15, 17-19
N.J.S.A. 2A:1B-7 5
N.J.S.A. 2A:1B-10 4

Other Authorities Cited

16 C.J.S., Constitutional Law, Sec. 314..... 19

NO. 84-134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN THE MATTER OF

PETER J. CORUZZI, JUDGE OF THE SUPERIOR COURT OF NEW JERSEY

On Appeal From the Supreme Court of New Jersey

MOTION OF APPELLEE TO DISMISS OF AFFIRM

The appellee hereby moves to dismiss this appeal or summarily to affirm the judgment of the Supreme Court of New Jersey under Rule 16, Paragraph 1(a), 1(b) and 1(c) of the Rules of this Court.

Constitutional Provision Involved

Article I, Section 10, cl. 1:

> No state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. . .

Statement of the Case

Appellant Peter J. Coruzzi was a Judge of the Superior Court of New Jersey. On the morning of November 6, 1981 he was arrested on the steps of his courthouse for taking a bribe in exchange for a non-custodial sentence in a criminal matter before him. When arrested Judge Coruzzi had $12,000 in bribe money in his pockets, which his accomplice had given him on the way to work. The money constituted a partial payment on a $20,000 bribe which was to be split with the accomplice.

On November 10, 1981, four days later, the facts were formally reported to the Supreme Court of New Jersey in the form of an affidavit sworn to by the Director of New Jersey's Division of Criminal Justice which prosecuted the matter. On that same day the Supreme Court of New Jersey filed a complaint seeking the removal of Judge Coruzzi from office, and it suspended him without pay pending the determination of the criminal proceedings.

Judicial removal proceedings are governed by constitution and statute in New Jersey. New Jersey's Constitution of 1947 provides in Article VI, Section VI, Paragraph 4:

> The Justices of the Supreme Court and the Judges of the Superior Court shall be subject to impeachment, and any judicial officer impeached shall not exercise his office until acquitted. The Judges of the Superior Court shall also be subject to removal from office by the Supreme Court for such causes and in such manner as shall be provided by law.

In accordance with this constitutional authorization New Jersey's Legislature in 1970 enacted the Judicial Removal Act, N.J.S.A. 2A:1B-1 et seq. The Act provides for the removal of judges for misconduct in office or unfitness by proceedings in the Supreme Court of New Jersey, and provides that judges might be temporarily suspended with or without pay during the pendency of removal proceedings. The pertinent statutory provisions are as follows:

> N.J.S.A. 2A:1B-2. Cause for removal
>
> A judge may be removed from office by the Supreme Court for misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence.
>
> N.J.S.A. 2A:1B-3. Institution of removal proceedings.
>
> A proceeding for removal may be instituted by either house of the Legislature acting by a majority of all its members, or the Governor, by the filing of a complaint with the clerk of the Supreme Court, or such proceeding may be instituted by the Supreme Court on its own motion.

At the time of Judge Coruzzi's suspension, the statute also provided:

> N.J.S.A. 2A:1B-5. Suspension pending determination.
>
> The Supreme Court may suspend a judge from office, with or without pay, pending the determination of the proceeding; provided, however, that a judge shall receive pay for the period of suspension exceeding 90 days.

On November 20, 1981 Judge Coruzzi was indicted for soliciting and accepting bribes in exchange for reduced and noncustodial sentences in three criminal matters before him. In one case a $10,000 bribe was paid with $7,000 going to Judge Coruzzi, in a second case a $20,000 bribe was paid with $15,000 going to Judge Coruzzi, and in a third case a $35,000 bribe was negotiated with $25,000 to go to Judge Coruzzi—the last arrangement had not come to fruition as of the time of Judge Coruzzi's arrest.

New Jersey's Judicial Removal Act contemplates that removal proceedings might be instituted in consequence of the filing of criminal charges against a judge, but also provides that a final determination of removal may not be made in such case until the criminal charges are finally determined. N.J.S.A. 2A:1B-10 provides in part:

> No hearing to remove a judge from office as provided for in this act shall be held until the cause for suspension, if the cause is a result of an independent civil, criminal or administrative action against the judge, is finally decided in a tribunal in which the judge had an opportunity to prepare his defense and was entitled to be represented by counsel.

As noted, Judge Coruzzi was arrested on November 6, 1981, and on November 10, 1981 the Supreme Court filed a complaint for removal and suspended Judge Coruzzi without pay. The first ninety days of his suspension ran from November 10, 1981 to February 8, 1982. The statutory amendment in issue on this appeal was introduced in the New Jersey Senate on December 10, 1981, or a month after Judge Coruzzi was suspended. It was enacted by both houses of the Legislature and signed into law by the Governor on January 12, 1982, the 64th day of the suspen-

sion. The amendment altered N.J.S.A. 2A:1B-5 by eliminating the final clause and the 90 day limitation on withholding pay during a suspension, as follows:

> The Supreme Court may suspend a judge from office, with or without pay, pending the determination of the proceeding; *provided, however, that a judge shall receive pay for the period of suspension exceeding 90 days.* (italized language omitted by amendment).

The original 90 day limitation would not have come into play with respect to appellant until approximately one month after the amendment was enacted.

On March 25, 1982 Judge Coruzzi was found guilty of four counts of bribery by a jury, and on May 7, 1982 he was sentenced to a five year prison term. The Appellate Division of the Superior Court of New Jersey affirmed the conviction, *State* v. *Coruzzi,* 189 N.J. Super. 273, 460 A.2d 120 (App. Div. 1983), and the Supreme Court of New Jersey denied certification, 94 N.J. 531, 468 A.2d 184 (1983). Respondent was committed to a State prison and served his sentence.

The criminal proceedings having finally been determined adversely to Judge Coruzzi, the removal proceedings went forward. A three judge panel was designated to hear the evidence for the Supreme Court pursuant to N.J.S.A. 2A:1B-7. In a report to the New Jersey Supreme Court dated October 14, 1983, the panel found that the conviction conclusively established Judge Coruzzi's guilt, and, given the facts alleged and the crime charged, that it mandated his removal from office. By the decision rendered on March 20, 1984 which is the subject of this appeal, the Supreme Court of New Jersey removed Judge Coruzzi from office on the basis of the criminal conviction.

Earlier, on May 31, 1983, Judge Coruzzi had moved to modify the original order of suspension, to restore his judicial salary during the suspension, on the grounds now raised on this appeal. That application was denied in the New Jersey Supreme Court in its March 20, 1984 decision. Judge Coruzzi was not, therefore, paid during any portion of his suspension. The facts and evidence concerning appellant's crimes and the criminal proceedings against him are set forth at length in the Appellate Division decision affirming his conviction. *State* v. *Coruzzi,* 189 N.J. Super. 273, 460 A.2d 120 (App. Div. 1983), *certif. denied,* 94 N.J. 531, 468 A.2d 184 (1983). See also the decision below. Appellant's Appendix A.*

*As reflected in his jurisdictional statement, Judge Coruzzi's first attempt to seek the restoration of his pay during his supension was by filing a complaint in the U.S. District Court in New Jersey under 42 U.S.C. §1983, raising the *Ex Post Facto* and Bill of Attainer claims, but not the Impairment of Contract claim. The District Court granted summary judgment dismissing the complaint on the ground that the Judicial Removal Act was not punitive in nature. Appellant's Appendix B. The Third Circuit affirmed, but on the ground that the District Court should have abstained from hearing the matter under *Younger* v. *Harris,* 401 U.S. 37 (1971). Appellant's Appendix C, *Coruzzi* v. *State of New Jersey,* 705 F.2d 688 (3rd Cir. 1983).

ARGUMENT

POINT I

This appeal should be dismissed because it does not challenge the validity of a state statute under the U.S. Constitution within the meaning of 28 U.S.C. §1257(2), but rather only challenges the statute as applied in this case.

28 U.S.C. §1257 provides in the paragraph under which this appeal is brought that final judgments rendered by the highest court of a state may be reviewed by this Court:

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

This Court's appellate jurisdiction may be invoked under 28 U.S.C. §1257(2) where the validity of a state statute is challenged, but not where it is simply claimed that a right, privilege or immunity under the U.S. Constitution has been violated. *Live Oak Ass'n* v. *Railroad Commission,* 269 U.S. 354 (1926); *Virginia* v. *Imperial Coal Sales Co.,* 293 U.S. 15 (1934).

Appellant does not challenge the amendment to the Judicial Removal Act on its face or in its normal application, but only as applied to him because he was under suspension and facing criminal charges at the time of the amendment. The appeal is not then a challenge to the validity of the amendment on its face, for even if successful, no provision or language in the statute should be found invalid. Rather, the appeal merely challenges the amendment as applied in this case and involves simply a claim that respondent was

denied a right, privilege or immunity arising under the U.S. Constitution, which would constitute a basis for seeking *certiorari* but not an appeal. For this reason it is contended that there is no jurisdiction under 28 U.S.C. §1257 (2) and that the appeal as to these claims should therefore be dismissed.

POINT II

This appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed because the federal questions raised are not substantial, in that New Jersey's judicial removal statute is not punitive in intent or design so that the *Ex Posto Facto* and Bill of Attainder Clauses of the U.S. Constitution do not apply, and in that a judge as a public official holds office under law, not contract, so that the Impairment of Contract Clause in the U.S. Constitution does not apply.

Appellant challenges the application of the amndment of N.J.S.A. 2A-1B-5 to him. When he was suspended from office the statute provided that the denial of pay during a suspension for misconduct would not extend beyond the first 90 days of a suspension. The amendment was enacted before the expiration of the first 90 days of appellant's suspension so that appellant would not have been entitled to pay under the former 90 day limitation until after the time of the amendment. Yet appellant contends that the amendment—which had only a prospective effect upon him—violated the *Ex Post Facto*, Bill of Attainder and Impairment of Contract clauses of the U.S. Constitution.

The Supreme Court of New Jersey rejected the *Ex Post Facto* and Bill of Attainder claims on the ground that

those provisions apply only to laws which are penal in nature, and that neither the Judicial Removal Act nor the amendment are penal in nature. It also rejected the Impairment of Contract claim on the ground that appellant as a public official held his position under the law and not contract so that the Impairment of Contract clause does not apply. The Supreme Court of New Jersey's decision with respect to these claims is set forth in its March 20, 1984 slip opinion, reprinted in Appellant's Appendix A, at pages A35 to A51. Its decision is in accordance with law and thus gives rise to no substantial federal claim and should be affirmed.

Article 1, Section 10, Clause 1 of the U.S. Constitution prohibits states from enacting *ex post facto* laws, which are generally defined as laws which impose a criminal penalty for past conduct which was lawful when performed, or impose a penalty for past conduct which is harsher than provided for when the conduct occurred. *Beazell* v. *Ohio,* 269 U.S. 167 (1925).

Beginning with this Court's decision in *Calder* v. *Bull,* 3 U.S. 386 (1798), the *ex post facto* prohibition has been interpreted as only extending to laws which are penal in nature. The provision "limit[s] the powers of the States only with regard to the imposition of punishment." *United States Trust Co.* v. *New Jersey,* 431 U.S. 1, 17 at n. 13 (1977).

The determination of whether a legislative enactment is penal in nature depends on the substance of the legislation and a legislature's intent in enacting it, and not on the form of the enactment. Thus, this Court said in *Trop* v. *Dulles,* 356 U.S. 86, 96 (1958):

> [i]f the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered

> penal. But a statute has been considered non-penal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a non-penal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature.

Accord, Flemming v. *Nestor,* 363 U.S. 603 (1960). This focus on substance over form was first articulated by the Court in two post-Civil War cases, *Cummings* v. *Missouri,* 71 U.S. 277 (1867) and *Ex parte Garland,* 71 U.S. 333 (1867), in which post-Civil War statutes required persons seeking to engage in certain professions to swear under oath that they had not committed any acts of hostility or disloyalty against the government of the United States. In each case the Court found that the laws were clearly designed to inflict further punishment on those who had opposed the Union during the Civil War, and, since the statutes did not serve any legitimate regulatory purpose, the Court concluded that they were *ex post facto* laws even though they were regulatory rather than penal in form. *Cummings,* 71 U.S. at 324; *Ex parte Garland,* 71 U.S. at 378.

While the emphasis on purpose is of critical importance where an effort is made to disguise a punitive intent underlying a law, as in *Cummings* and *Ex parte Garland,* it is equally important where a law is regulatory in purpose, but appears to be penal. *DeVeau* v. *Braisted,* 363 U.S. 144 (1960) and *Hawker* v. *New York,* 170 U.S. 189 (1898) are cases of this type. *Hawker* involved a New York statute which prohibited anyone convicted of a felony from practicing medicine, and an ex-felon contended that the statute was an *ex post facto*

law as applied to him since he was convicted before the statute was enacted. The Court rejected this contention, saying in part (170 U.S. at 196):

> That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance, and not the form. . . . The State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character.

The restriction in *Hawker* was found to serve a legitimate regulatory purpose, and this non-penal purpose led the Court to conclude that the *ex post facto* clause did not apply. 170 U.S. at 200. In *DeVeau* the New York Waterfront Commission Act provided that no person could collect dues on behalf of a labor union if any officer of the union had been convicted of a felony, and a union officer who was convicted of a felony before the passage of the act contended that it violated the *Ex Post Facto* clause. This Court again emphasized that the substance of the statute, not its form, governed. It said (363 U.S. at 160):

> The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant circumstances are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession.

The absence of a punitive purpose has proved fatal when *ex post facto* arguments have been raised in pro-

fessional disciplinary proceedings. Such proceedings have uniformly been held to protect the public against unworthy professionals and not to punish. *Ex post facto* arguments have been rejected in attorney disciplinary proceedings. See *Matter of Randall,* 640 F.2d 898, 905 (8th Cir. 1981), *cert. den.* 454 U.S. 880 (1981); *North Carolina State Bar* v. *DuMont,* 52 N.C. App. 1, 277 S.E. 2d 827, 835-36 (Ct. App. 1981), *mod. and aff'd,* 304 N.C. 627, 286 S.E.2d 89 (1982); *Matter of Needleman,* 63 A.D. 2d 216, 407 N.Y.S.2d 3, 5 (App. Div. 1978); *In re Brown,* 157 W.Va. 1, 197 S.E.2d 814, 817 (1973). *Ex post facto* claims have also been rejected in physician disciplinary proceedings for the same reason. See *Arthurs* v. *Board of Registration,* 418 N.E.2d 1236, 1246 (Mass. 1981); *Furnish* v. *Board of Medical Examiners,* 149 Cal. App.2d 326, 308 P.2d 924 (Ct. App. 1957), *cert. den.,* 355 U.S. 827 (1957).

Judicial disciplinary proceedings have uniformly been recognized as serving a regulatory purpose rather than a punitive purpose, and appellant concedes the statute here is regulatory as generally applied. Jurisdictional Statement, page 13. The Supreme Court of North Carolina described such proceedings as being:

> . . . neither criminal nor civil in nature. It is an inquiry into the conduct of a judicial officer, the purpose of which is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of its judges. [*In re Crutchfield,* 289 N.C. 597, 602, 223 S.E.2d 822, 825 (Sup. Ct. 1975)].

A judicial disciplinary proceeding "lacks the essential characteristics of a criminal prosecution. The object is

not to inflict punishment, but to determine whether one who exercises judicial power is unfit to hold a judgeship." *In re Kelly*, 238 So.2d 565, 569 (Fla. 1970), *cert. den.* 401 U.S. 962 (1971). *Accord, In re Rome,* 218 Kan. 198, 542 P.2d 676, 682-83 (1975); *In re Diener,* 268 Md. 659, 304 A.2d 587 (1973), *cert. den.* 415 U.S. 989 (1974); *Sharpe* v. *State ex rel. Oklahoma Bar Association,* 448 P.2d 301, 307 (Okla. Jud. 1968), *cert. den.* 394 U.S. 904 (1969); *Matter of Probert,* 411 Mich. 210, 308 N.W.2d 773 (1981). The Supreme Court of New Jersey in the decision below followed this uniform body of law and held that New Jersey's Judicial Removal Act and the amendment are not penal in purpose. Appellant's Appendix A, at A28, A41, A43-A45, A48-A49. Since the issue involves the construction of New Jersey law, the New Jersey Supreme Court's determination should not be subject to review in this Court. *Guarantee Trust Co.* v. *Blodgett,* 287 U.S. 509 (1933); *Kingsley International Picture Corp.* v. *Regents,* 360 U.S. 684 (1959).

Several courts in addition to the New Jersey Supreme Court have considered and rejected *ex post facto* arguments raised in judicial disciplinary proceedings on the ground that such proceedings are not penal. *Matter of Seraphim,* 97 Wis.2d 485, 294 N.W.2d 485, 490-91 (1980), *cert. den.* 449 U.S. 994 (1980); *In re Inquiry Concerning a Judge, etc.,* 357 So.2d 172, 180-81 (Fla. 1978); *Nicholson* v. *Jud. Ret. and Removal Com'n.,* 562 S.W.2d 306, 308 (Ky. 1978). The Supreme Court of Kentucky in *Nicholson,* in rejecting an *ex post facto* claim in a judicial disciplinary proceeding based on conduct which occurred before the tribunal was established, said (562 S.W.2d at 308):

> It is clear that the "ex post facto" prohibition applies only to criminal matters. Beazell v. Ohio, 269 U.S. 167, 169, 46 S.Ct. 68, 70 L.Ed. 216 (1925);

Thompson v. Utah, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898); Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883); Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798). A proceeding before the Commission is not a criminal matter. See Napolitano v. Ward, 457 F.2d 279 (7th Cir. 1972), cert. den. 409 U.S. 1037, 93 S.Ct. 512, 34 L.Ed.2d 486, reh. den. 410 U.S. 947, 93 S.Ct. 1351, 35 L.Ed.2d 616; In re Haggerty, 257 La. 1, 241 So.2d 469 (1970); Sharpe v. State, 448 P.2d 301 (Okl. Jud. 1968), cert. den. 394 U.S. 904, 89 S.Ct. 1011, 22 L.Ed.2d 216.

The purpose of Section 121 of our constitution is the regulation of the conduct of those persons charged with the administration of justice. The aim of proceedings instituted pursuant to this section is to improve the quality of justice administered within the Commonwealth by examining specific complaints of judicial misconduct, determining their relation to a judge's fitness for office and correcting any deficiencies found by taking the least severe action necessary to remedy the situation. The target is not punishment of the judge. Consequently, the action of the Commission does not constitute a violation of the "ex post facto" prohibition of the federal and state constitutions. See Flemming v. Nestor, 363 U.S. 603, 614, 80 S.Ct. 1367, 4 L.Ed.2d 1435, 1446 (1960); DeVeau v. Braisted, 363 U.S. 144, 160, 80 S.Ct. 1146, 4 L.Ed.2d 1109, 1120 (1960). Cf. Ex parte Garland, 4 Wall. 333, 71 U.S. 333, 18 L.Ed. 366 (1866); Cummings v. Missouri, 4 Wall. 277, 71 U.S. 277, 18 L.Ed. 356 (1866).

The New Jersey Judicial Removal Act has the same non-penal purpose as the proceedings in the foregoing

cases. New Jersey's Constitution authorizes the Legislature to provide for the removal of Superior Court judges apart from impeachment, N.J. Const. Art. VI, Sect. VI, Para. 4, and the Act was passed in 1970 in response to a long series of requests by members of the New Jersey legal community for the creation and implementation of a judicial removal system in accordance with the Constitution. See Sullivan, Mark A., "Discipline of Judges," 88 N.J.L.J. 265 (1965); "Legislation Needed For Judicial Discipline and Reform," 92 N.J. L.J. 336 (1969); "Removal of Judges—Senate No. 116." 93 N.J.L.J. 52 (1970).

The issue on this appeal is whether the amendment should be treated as having a punitive purpose as applied to respondent because it was passed while he was under suspension. Appellant concedes the amendment is not punitive as applied in future cases, at page 13 of his Jurisdictional Statement. It is true that appellant lost the right to be paid at a point following the amendment of N.J.S.A. 2A:1B-5 when he remained suspended and not working. But, as noted above, the mere fact that an individual may suffer "unpleasant circumstances" as a result of the enactment of a law does not render the law penal in nature so that the *ex post facto* clause applies. The question is whether the consequence for the individual is the intended purpose of the law and whether it is intended to punish, or whether instead the adverse consequence is merely a "relevant incident" to another legitimate non-penal purpose.

Plainly judicial disciplinary proceedings and temporary suspensions without pay are intended to maintain public confidence in the judiciary. Judicial removal proceedings must be administered by the judiciary if independence is to be preserved, and thus it is in the nature of self-regulation. The strength of the public's

confidence in a self-regulated judiciary will depend on whether it believes the judiciary will regulate itself rigorously in accordance with high public standards, and whether it does so without affording undue advantage or privilege to its members. Anything that causes the public to doubt or question the integrity of judicial removal proceedings undermines the public's confidence in them, and thus defeats the very purpose of the proceedings and undermines the effectiveness of the judiciary.

Appellant's continued receipt of his publicly funded salary during his suspension would cause just such an erosion of public confidence. A salary is generally regarded as something that is earned. The notion that an individual accused of serious wrongdoing such as bribery should continue to function as a judge where a grand jury has indicted him, or to continue to be paid his salary while not working because he is suspended under such circumstances could be perceived by the public as unduly solicitous and certainly as extending to judges greater privileges than most people would enjoy. It could also be viewed as evidence that members of the judiciary are unwilling to discipline "one of their own," and are incapable of addressing allegations of professional misconduct in a detached, dispassionate manner. Continuing to pay a judge who is not working because he has been indicted by a State grand jury for bribery could also appear to the public to be an inappropriate expenditure of public funds and a form of favoritism and privilege, and create the impression that the judiciary is not overly concerned when a judge violates his sacred oath to exercise his powers honestly and not in exchange for bribes.

Nor does the fact that the amendment was enacted after reports to the New Jersey Legislature that appellant would probably be entitled to resume collecting his pay

during his suspension under the 90 day limitation in the statute support the conclusion that the amendment was directed only at him or intended to punish him. The amendment of N.J.S.A. 2A:1B-5 is general in scope and not limited to appellant. Compare *Hiss* v. *Hampton,* 388 F. Supp. 1141 (D.D.C. 1972), cited by appellant, in which Congress enacted a statute which the legislative history demonstrated was intended to punish a particular individual, and which operated to deprive a narrowly and arbitrarily drawn class of federal employees of pension benefits which could only have included that individual.

The obvious intent of the amendment to N.J.S.A. 2A:1B-5 was not to punish appellant. Rather, appellant's case made it apparent that there was a shortcoming in the statute, namely that a judge suspended for criminal conduct would be paid while suspended and indicted, after the first 90 days. Where a legitimate purpose can be discerned in legislation, a court should not infer the existence of an additional improper purpose. In addition, "it is obligatory in statutory construction to take, or presume, the intention of the Legislature according to what is consonant with reason and good discretion," *Galloway* v. *Council of Clark Tp.,* 92 N.J. Super. 409, 424, 223 A.2d 644 (Law Div. 1966), *aff'd* 94 N.J. Super. 527, 229 A.2d 279 (App. Div. 1967). *Accord, Wright* v. *Vogt,* 7 N.J. 1, 6, 80 A.2d 108 (1951).

Moreover, appellant cites no legislative history for the amendment to support his contention that it was enacted to punish him individually. As this Court noted in rejecting an *ex post facto* argument in *Flemming* v. *Nestor,* 363 U.S. 603, 617 (1960);

> only the clearest proof [can] suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquires into Congressional motives are at

> best a hazardous matter, and when the inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed . . . . "[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void."

Appellant's contention that the amendment to N.J.S.A. 2A:1B-5 is a bill of attainder is without merit for similar reasons. The passage of bills of attainder, like the enactment of *ex post facto* laws, is prohibited by Article I, §10, Clause 1 of the U.S. Constitution. A bill of attainder is defined as "a legislative act which inflicts punishment without a judicial trial," *Cummings* v. *Missouri*, 71 U.S. 277 (1867) at 323. Likewise the prohibition against *ex post facto* laws, the prohibition against bills of attainder only extends to laws that have a punitive purpose. *United States* v. *Lovett*, 328 U.S. 303, 321-328 (1946) (concurring opinion of Justice Frankfurter); *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). *Nixon* involved a statute directing the GSA to take custody of presidential papers, and this Court rejected a contention that it was a penal statute such that the prohibition against bills of attainder applied. It relied on the same analysis utilized in considering *ex post facto* claims, saying the proper approach was to apply a (433 U.S. at 475-76):

> functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. Cummings v. Missouri, 4 Wall. at 319-320; Hawker v. New York, 170 U.S. 189, 193-194, 18 S.Ct. 573, 575, 42 L.Ed. 1002 (1898); Dent v. West Virginia, 129 U.S. 114, 128, 9 S.Ct. 231, 235, 32 L.Ed. 623 (1889); Trop v. Dulles, 356

> U.S. 86, 96-97, 78 S.Ct. 590, 595-596, 2 L.Ed.2d 630 (1958) (plurality opinion); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S.Ct. 554, 567-568, 9 L.Ed.2d 644 (1963). Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decision makers.

As noted above, New Jersey's Judicial Removal Act serves an important public purpose in regulating the judiciary and in protecting the integrity and appearance of integrity in the judiciary. Neither it nor the amendment are punitive in intent or design, and therefore neither the *ex post facto* or bill of attainder prohibitions apply, and appellant's claim must fail.

Appellant's third and final contention is that the application of the amendment of N.J.S.A. 2A:1B-5 to him violates the portion of Article I, Section 10, Clause 1 of the U.S. Constitution which prohibits the states from passing laws "impairing the obligation of contracts . . .". However, the Impairment of Contracts Clause does not apply to appointed public officials. 16 *C.J.S. Constitutional Law* §314 at 1346. Instead, such officials have been uniformly held to be beyond the protection of the clause because such officials do not hold office under contracts to which the constitutional protection applies. Since *Butler* v. *Pennsylvania*, 51 U.S. 402 (1850) it has been settled that the appointment by which an individual assumes a public office is not a "contract" within the meaning of the Impairment of Contracts Clause.

In *Butler* three state canal commissioners complained that a state statute which reduced their statutorily prescribed salaries violated the Impairment of Contracts Clause because their appointments constituted state con-

tracts. However, this Court held that their appointments did not constitute contracts within the meaning of the clause. It said (51 U.S. at 416):

> The contracts designed to be protected by the tenth section of the first article of [the Constitution] are contracts by which perfect rights, certain definite, fixed private rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require.

This Court also said (51 U.S. at 417):

> [T]he appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term "contracts," or, in other words, the vested, private personal rights thereby intended to be protected.

Moreover, as determined by the Court below, under New Jersey law an appointment to a public office has long been held to not constitute a contract. See *City of Hoboken* v. *Gear*, 27 N.J.L. 265, 277 (Sup. Ct. 1859); *Turner* v. *Passaic Pension Commission*, 10 N.J. Misc. 1270, 1273, 163 A. 282 (Sup. Ct. 1932). Since the issue involves the construction of New Jersey law, the New Jersey Supreme Court's determination should not be subject to review in this Court. *Guarantee Trust Co.* v. *Blodgett*, 287 U.S. 509 (1933); *Kingsley International Picture Corp.* v. *Regents*, 360 U.S. 684 (1959). It has also

been held elsewhere that the *Butler* rule applies to members of the judiciary who are appointed public officials. *Kingston* v. *McLaughlin*, 359 F. Supp. 25, 29 (D. Mass. 1972), *affirmed*, 411 U.S. 923 (1973); *Corn* v. *City of Oakland City*, 415 N.E.2d 129, 133 (Ind. Ct. App. 1981). *Compare*, *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938) in which this Court held that a teacher was protected by the Impairment of Contract Clause because an employment contract did exist. It said that under state law, "[t]he position of a teacher in the public schools is not a public office, but an employment by contract between the teacher and the school corporation." 303 U.S. at 106.

In summary, Judge Coruzzi held his position as a judge under law and the terms and conditions of his office were provided for by law and not contract, and therefore any change in the law concerning his right to be paid his salary while suspended for taking bribes in office could not possibly implicate Article I, Section 10, Clause 1 of the U.S. Constitution, which prohibits states from passing a "law impairing the obligation of contracts." Moreover, both the Judicial Removal Act and the amendment lengthening the permissible period of a suspension without pay do not violate the *Ex post facto* and Bill of Attainder prohibitions of the U.S. Constitution as applied to appellant because they serve a regulatory and not punitive purpose.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the judgment of the Supreme Court of New Jersey summarily affirmed.

Respectfully submitted,

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Counsel for Appellee
Richard J. Hughes Justice Complex,
CN 112,
Trenton, New Jersey 08625.
(609) 292-1956
By: EUGENE J. SULLIVAN
Assistant Attorney General

Dated: August 23, 1984